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March 7, 1994

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*Via Telecopy  
and Federal Express*

The Honorable Anne K. Bingaman  
Assistant Attorney General, Antitrust Division  
U.S. Department of Justice  
Washington, D.C. 20530

Re: Request for Business Review

Dear Ms. Bingaman:

We represent a newly formed trade association, Southern California Independent Lennox Dealers ("SCILD"), which seeks the issuance of a business review letter under the Department of Justice's Business Review Procedure, 28 C.F.R. 50.6. In particular, this letter requests a statement of the Department's current enforcement intention with respect to participation of both SCILD and Lennox Industries, Inc. ("Lennox"), a manufacturer of heating and air conditioning systems, in a cooperative advertising program.

This request consists of four parts. The first section describes Lennox and SCILD. The second portion sets forth the facts respecting the proposed cooperative advertising program and SCILD's proposed participation in it. We next discuss the competitive analysis of the program and

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what SCILD believes are the pro-competitive results of it. We conclude with a request for expedited consideration and the reasons supporting this request.

**LENNOX AND SCILD**

Lennox manufactures heating and air conditioning equipment for commercial and residential buildings. Lennox distributes its products through independent dealers nationwide. The typical independent Lennox dealer is a family-owned heating and air conditioning contractor which sells, installs, and services equipment manufactured by Lennox and its many competitors. Lennox's primary competitors in the Los Angeles area include the manufacturers of: Day & Night, Carrier, Payne, Rheem, Ruud, Heil-Quaker, Amana, American Standard, Trane, York and Tempstar. In the Los Angeles area, SCILD believes that Lennox's penetration in sales of residential products is small.

As of April 1, 1994, SCILD estimates that there will be 40 Lennox dealers in the Los Angeles area who sell Lennox residential replacement equipment. However, none of these are exclusive Lennox dealers. In addition there are approximately 1,000 other heating and air conditioning contractors in Southern California that do not sell Lennox residential replacement products but do sell the residential replacement products of Lennox' competitors.

SCILD is a trade association of Lennox dealers, formed in January of this year. By April SCILD anticipates that it will have approximately 25 members. One of its goals is to enhance the reputation of and increase the demand for Lennox products in the Los Angeles area. It also was formed so that members could address mutual concerns which face all independent dealers, including healthcare concerns, earthquake preparation, disaster responses, impact of crime, technological developments, labor issues, worker training and education, health and safety concerns (particularly workers' compensation claims), as well as take advantage of cooperative advertising programs.

Membership in SCILD is open to all Lennox dealers in the greater Los Angeles area who satisfy certain objective standards relating to Lennox product loyalty and quality of service.

All existing SCILD members advertise throughout the Los Angeles area. They have several means of advertising,

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including in yellow pages and newspapers. A few also use cable t.v. and telemarketing. Direct mail (often including leafleting residences and commercial establishments) is also employed. Members compete in all areas subject only to practical considerations such as those imposed by distances, size and manpower.

*THE PROPOSED CO-OP ADVERTISING PROGRAM*

SCILD would like to develop an advertising campaign which will advertise Lennox products and take advantage of advertising funds available from Lennox in so doing. SCILD and Lennox hope that the campaign will increase the penetration of Lennox products in the Los Angeles area. SCILD hopes that the campaign will promote Lennox as a reliable name in heating and air conditioning.

Under the proposed program, SCILD would implement an advertising campaign which would advertise Lennox products on radio and by direct mail (and perhaps newspapers) in the Los Angeles area. As presently proposed, Lennox's involvement in the campaign would be to advance advertising funds and to assist in the creation of the form of advertising to ensure that it meets Lennox's quality and trademark guidelines.

A critical component of this proposed campaign will be an "1-800" telephone number which will connect callers to a Lennox dealer located near them. For example, the proposed advertisement might include: "call 1-800-2-LENNOX to speak with the Lennox dealer nearest you."

SCILD proposes to contract with the telephone company to route incoming calls made to the 1-800 number to particular SCILD members based on the location from which the call was placed. To facilitate this, each SCILD member will be given the opportunity to receive all 1-800 in-coming calls in specified areas based on the zip code of the caller. The purpose of routing the call to the nearest SCILD member is to facilitate the prompt and efficient handling of customer requests, thus furthering an image of responsiveness and reliability. As you can appreciate, the random assignment of calling areas or rotation of them would not further this goal; indeed such would actually frustrate it.

Let me emphasize that under the proposed program cooperation between dealers is very limited in scope. It applies *only* to *in coming* calls on the 1-800 Lennox number during the life of the advertising campaign. Members are not

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restrained in any way in receiving any other type of customer inquiry or telephone call.

Members will not be limited in their advertising and will continue their own advertising. Each will also be able to advertise Lennox products and services and sales as they wish.

Most importantly, SCILD members will continue to be free to compete for all customers, even those who call in on the 1-800 Lennox number. Indeed, the telephone numbers of all 1-800 callers will be disseminated to all members so that any SCILD member can follow up with a 1-800 caller even if that member did not initially receive the call on the 1-800 Lennox number. The frequency of the dissemination of caller phone numbers among members has yet to be determined.

The assignment of callers' zip codes to particular members will be made by SCILD. The Board of Directors of SCILD will, among other things, decide upon the criteria and assign the areas for the calls in coming to the 1-800 Lennox number. Each SCILD member will be required to respond promptly to all customers that call that SCILD member via the 1-800 number.

Given the number of members at the present time, it is anticipated that as additional dealers become SCILD members, the areas within which existing members receive incoming calls on the 1-800 telephone number will shrink over time; SCILD will reassign these portions of an existing member's area (within which it receives 1-800 calls) to new members.

#### *PRO-COMPETITIVE EFFECTS OF THE PROGRAM*

SCILD believes that the proposed advertising campaign is pro-competitive. It permits Lennox and its dealers to achieve greater exposure in the Los Angeles area. SCILD also believes the program will increase the image of Lennox products. In other words it promotes competition. See, e.g., *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 295 (1985) (approving arrangement which "would seem to be 'designed to increase economic efficiency and render markets more, rather than less, competitive.'"); *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979) (same).

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Quite frankly, although SCILD believes that the program as described, would not violate any law if implemented, SCILD decided to seek business review of the proposed advertising program because of its proposed role with respect to it and a few old consent decrees which suggest that any agreement between competitors to refer customers to the other constitutes a horizontal market division. See, e.g., *United States v. Air Conditioning and Refrigeration Wholesalers*, 1976-2 Trade Cas. (CCH) ¶ 61,160 (N.D. Ohio 1976); *United States v. American Body and Trailer, Inc.*, 1958 Trade Cas. (CCH) ¶ 69,063 (W.D. Okl. 1958); *United States v. Scott & Williams, Inc.*, 1954 Trade Cas. (CCH) ¶ 67,748 (S.D.N.Y. 1954). SCILD's concern is that the Department of Justice would somehow construe its assigning of the right of members to receive in-coming calls on the 1-800 telephone number during the life of the advertising campaign as falling within the prohibitions of the Sherman Act.

SCILD believes that its involvement in the proposed advertising campaign, does not result in any restraint whatsoever on SCILD members except with respect to the receipt of incoming calls on the 1-800 telephone number (which would not even exist if it were not for the program) during the lifetime of the campaign.

Further, SCILD's designation of areas from which incoming calls will be routed to particular SCILD members will not give any SCILD member exclusive rights to serve customers in that area. To the contrary, all SCILD members will know who calls in on the 1-800 number and be able to compete for the business of all customers who call.

At best, the program has only an ancillary impact to a pro-competitive advertising program. SCILD's participation in the program and the determination of which member will receive an incoming telephone call is necessary to make the above described advertising program work. In practical terms, it would not be efficient to require individual dealers to set up their own separate 1-800-Lennox numbers and advertise them simultaneously on the radio. If they were to do this, callers would not necessarily reach the dealers closest to it; nor would dealers be in a position to effectively and reliably service calls made throughout the vast Los Angeles area, the very purpose of the campaign in the first place. Moreover, callers would not have a single number to call for information about Lennox products. Accordingly, the result would be extreme customer confusion and dissatisfaction towards Lennox and its dealers.

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The antitrust laws cannot be read to mandate dealer advertising programs which will only confuse customers and turn them off to Lennox products. This is particularly true given that the proposed program has safeguards which will protect competition as all SCILD members will continue to be free to advertise and sell as they each independently determine in all parts of the Los Angeles area.

Accordingly, SCILD believes that the proposed advertising campaign, as described above, cannot be analogized to the customer referral cases set forth above as the pending program and SCILD's activities in connection therewith merely touches lightly upon but a single advertising campaign. SCILD's involvement in the program simply cannot be described as a market division among competitors, particularly since neither it nor its members have market power, the 1-800 advertising will not affect dealer pricing and does not limit areas of competition by the independent Lennox dealers. See, generally, *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 188 (7th Cir. 1985) ("Cooperation is the basis of productivity. It is necessary for people to cooperate in some respects before they may compete in others, and cooperation facilitates efficient production."); *American Floral Services, Inc. v. Florists' Transworld Delivery Association*, 633 F. Supp. 201, 217-22 (N.D. Ill. 1986); *National Bank of Canada v. Interbank Card Association*, 507 F. Supp. 1113, 1122-23 (S.D.N.Y. 1980), *aff'd*, 666 F. 2d 6 (2d Cir. 1981); Hills, *Antitrust Advisor* § 7.40 at 502 (3d Ed. 1985) ("Joint advertising campaigns [conducted by a trade association] are often used to gain product acceptance. . . . A trade association joint advertising program may reduce the financial burden to individual efforts and be of great benefit to consumer education.").

**REQUEST FOR EXPEDITED CONSIDERATION**

Ever mindful of the demands placed on the Antitrust Division, SCILD respectfully requests that the requested business review be conducted in such a manner so that it can be finalized no later than April 1, 1994, if not earlier. The reason that SCILD is requesting this priority is so that the program can commence on April 1, 1994.

It is imperative that the campaign commence by April 1, the traditional starting date of manufacturers and dealers for summer advertising. If SCILD waited beyond this date, both Lennox and its dealers would lose a very critical opportunity to start advertising at the beginning of the

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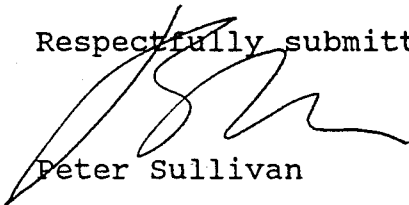
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season along with their competitors. Their advertising could therefore be impacted during an entire selling season.

SCILD appreciates all consideration given to it in this matter. If you have any questions with respect to this request, please do not hesitate to contact me.

Thank you.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "Peter Sullivan", written over the typed name.

Peter Sullivan

PS/em